

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

4 ePLUS, INC. :  
5 Plaintiff, :  
6 v. : Civil Action  
7 : No. 3:09CV620  
LAWSON SOFTWARE, INC. :  
Defendant. : October 28, 2011

COMPLETE TRANSCRIPT OF CONFERENCE CALL  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

16 Scott L. Robertson, Esq.  
17 Jennifer A. Albert, Esq.  
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UNITED STATES DISTRICT COURT

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4 THE COURT: Hello. This is ePlus, Inc.

5 || against Lawson, Inc., 3:09CV620.

6 Who's here for whom, beginning with counsel  
7 for the plaintiff?

8 MR. WILLETT: Judge, on behalf of ePlus, you  
9 have Henry Willett with Christian Barton in Richmond.  
10 Additionally, you have Jennifer Albert, Scott  
11 Robertson and Michael Strapp.

12 MR. CARR: Judge, this is Dabney Carr with  
13 Troutman Sanders on behalf of Lawson Software. Also  
14 on the line for Lawson Software are Kirstin  
15 Stoll-DeBell of Merchant & Gould, and Dan Thomasch,  
16 Jason Lo, and Josh Krevitt of the law firm of Gibson  
17 Dunn.

18 THE COURT: I've been gone for three weeks.  
19 When did Gibson Dunn get in this case?

20 MR. CARR: While you were gone, Judge, we  
21 filed -- this is Dabney Carr again. We filed pro hac  
22 vice motions for them, and they have, I believe, all  
23 been granted.

24 THE COURT: Yeah, I think I remember signing  
25 some motions.

1       Lawson wouldn't take discovery, Your Honor. And  
2       Lawson has every right to serve discovery and has done  
3       that.

4           THE COURT: I understand that, but the point  
5       is when you delay what you're doing, you have to pay  
6       the price for delaying.

7           MR. KREVITT: But we didn't delay, Your  
8       Honor.

9           THE COURT: Well, you did because you should  
10       have raised that in September when we were having the  
11       scheduling conference on this. That's their point,  
12       and that's a fairly reasonable point actually. So I  
13       understand what's happened.

14       We have got new lawyers in the case. Just  
15       understand, we're not going to retry the case.

16       MR. KREVITT: Your Honor, the notion of  
17       retrying the case, I have to respond having heard that  
18       from Mr. Robertson six times. I want to be very, very  
19       clear, Your Honor. We do not want to retry this case.  
20       We understand the issues that Your Honor will have to  
21       address.

22       I think if Your Honor reads Mr. Merritt's  
23       letter from ePlus, it will be very, very clear to Your  
24       Honor the extent to which ePlus is trying to  
25       articulate a standard for this proceeding that is

1 simply wrong.

2 They say that the issue is whether or not the  
3 changes render the RQC product noninfringing. And  
4 then they quote Your Honor from that conference.

5 Your Honor's quote is correct. It gets the  
6 law exactly right, but the ePlus letter that sets  
7 forth what the issue for Your Honor to decide is  
8 wrong. It is not whether or not the new products  
9 infringe. We reach that only if there is first a  
10 judgment by Your Honor that the changes are not more  
11 than colorable.

12 If they are only colorable, then we reach the  
13 question as to whether there is infringement or not.  
14 And the problem, Your Honor, is we do not want to  
15 retry this case. We want to focus very narrowly on  
16 that question.

17 The reason a million pages of documents were  
18 produced in this case, Your Honor --

19 THE COURT: Excuse me. You want to focus  
20 very narrowly on what question?

21 MR. KREVITT: We want to focus very narrowly,  
22 Your Honor, in the first instance on the question that  
23 *TiVo v. EchoStar* says we have to, which is whether  
24 ePlus can prove that the new products are not more  
25 than colorably different.

1                   The first question, Your Honor, focuses  
2 simply on that delta between at the old products and  
3 the new products, not whether the new products  
4 infringe. They don't, but that's not the question for  
5 Your Honor in the first instance. It's simply when  
6 you compare the new product to the old product and you  
7 look at the delta, the differences between those  
8 products. Are those differences colorable, more than  
9 colorable, less than colorable? What is the  
10 difference between those? And the way you judge that,  
11 Your Honor, is using two tools.

12                   THE COURT: Wait a minute. Where do you go  
13 after that, according to you?

14                   MR. KREVITT: Where do we go after that?  
15 Well, in our view, Your Honor, we won't go anywhere.

16                   THE COURT: Let's assume that we've concluded  
17 that there are colorable differences.

18                   MR. KREVITT: Obviously, Your Honor,  
19 understands. I wasn't trying to be cute. My point  
20 was I think we'll win on that first issue.

21                   If we do not, if Lawson does not win and  
22 ePlus is able to prove that the new product is not  
23 more than colorably different, the delta isn't  
24 significant enough, then we go to the question  
25 regarding whether the new products infringe.

1                   MR. ROBERTSON: Your Honor, this is  
2 Mr. Robertson. This is where we fundamentally  
3 disagree. Lawson's articulated three reasons why RQC  
4 is supposed to be colorably different from RSS and the  
5 other systems that were found to infringe. And let's  
6 not lose sight that there were configurations Your  
7 Honor is aware about that just don't involve RSS.

8                   Having said that, if they only articulate  
9 three reasons and we show that all three of those  
10 reasons are wrong, then is Mr. -- is it Krevitt? I'm  
11 sorry. I know it's Josh. Is he suggesting we now  
12 have a new infringement trial?

13                  If they haven't articulated any other  
14 differences, I think Your Honor logically can assume  
15 it follows inexorably that they continue to infringe  
16 because that's the only three differences they  
17 identified.

18                  So if it's the suggestion we have some  
19 two-phase approach here where we have to have a  
20 retrial on infringement again, that's just not  
21 consistent with the case law. But we can brief that  
22 after we put our evidence on at what I would hope  
23 would be a focused contempt proceeding. And if that's  
24 their position, let that be their position. But I  
25 don't understand how they can come forward and say,

1 "We only changed three things," and if you show those  
2 things aren't colorably different, now we need a new  
3 infringement trial. That makes no sense to me and  
4 it's not what *TiVo* teaches.

5 MR. KREVITT: Your Honor, this is Josh  
6 Krevitt.

7 Given Your Honor's guidance on this call  
8 about revving engines and not revving engines, I've  
9 been doing my best not to interrupt, and I would  
10 appreciate the same courtesy from Mr. Robertson.

11 THE COURT: I think he thought you were  
12 through.

13 MR. KREVITT: Okay. The *TiVo* case, Your  
14 Honor, could not be any clearer. And, obviously, one  
15 thing on which the ePlus lawyers and the Lawson  
16 lawyers agree is that *TiVo v. EchoStar* is a big deal.  
17 And so Your Honor will make your own judgment on that.

18 In our view, and we could be wrong, Your  
19 Honor could read the case differently, in our view we  
20 think it's very clear that the Court in that case set  
21 out a two-part analysis.

22 And the first part is the colorable  
23 difference analysis. And the second part is if the  
24 plaintiff prevails on that first part whether there's  
25 infringement or not, Mr. Robertson -- I'm hoping, Your

1 Honor, we never reach this question because we win on  
2 the first one, of course, but Mr. Robertson, I think,  
3 clearly, and I think this is an objective statement of  
4 what he just said, and we disagree, conflated those  
5 two and said that if they prevail on the colorable  
6 question, I'm speaking in shorthand, of course, but if  
7 they prevail on that question, then it's reasonable  
8 for the Court to assume, for the Court to rule, that  
9 the new products infringe, and, therefore, find Lawson  
10 in contempt.

11 I respectfully submit, and it may well be  
12 that we've exhausted the utility of telling the Court  
13 what the case says, and the Court has and will read it  
14 for the Court, but we respectfully submit that that's  
15 wrong, that the Court set out this two-prong inquiry.

16 THE COURT: Excuse me just a minute.

17 How many cases have been decided following  
18 *TiVo* that deal with *TiVo* and apply it?

19 MR. KREVITT: That's a good question, Your  
20 Honor. I think it's not many. Half a dozen. We'll  
21 have our crack crew come up with an answer to that  
22 question, Your Honor. It's not many.

23 By the way, this issue was not in passing in  
24 *TiVo*, meaning the question --

25 THE COURT: We don't need to argue that now.

1                   MR. KREVITT: Okay. I just wanted to mention  
2 that that's a big deal in the case is what is the  
3 right inquiry. Should we be having an infringement  
4 case or should we not be having an infringement case.

5                   And the reason, Your Honor, if I may just say  
6 one more word, and I know Your Honor doesn't want to  
7 have a debate, but one thing to put this into context.

8                   The reason the *TiVo* court held what I'm  
9 saying the court held is as follows: A contempt  
10 proceeding, and we're seeing this right on this phone  
11 call, is different than in normal litigation. We have  
12 all the discovery available to both parties, and you  
13 have a jury, and you have all the procedural  
14 protections available, and the plaintiff has the  
15 burden of infringement, of course, and we have the  
16 ability to defend on validity. All those things exist  
17 in a normal litigation. And all those things or many  
18 of those things don't exist in a contempt proceeding.

19                   And what the *TiVo* court ruled was if the  
20 products are sufficiently different, the new products  
21 from the old products, and ePlus thinks they infringe,  
22 let them bring an infringement case. Again, I'm not  
23 being cavalier about that, Your Honor. We think they  
24 don't. But if they think the products infringe, but  
25 they're very different from the old products, then

1 that's not an issue for a contempt proceeding. That's  
2 an issue for a new lawsuit.

3 Only if the products are so close that they  
4 can satisfy this -- that they are not colorably  
5 different, that they are essentially the same.

6 THE COURT: Isn't that what Mr. Robertson is  
7 saying is that if they're not colorably different,  
8 then you violate the Court order and the determination  
9 that there has been an infringement of the patent?

10 MR. KREVITT: Yes.

11 THE COURT: I don't think you're really  
12 saying anything different.

13 MR. KREVITT: Well, we are, Your Honor, in  
14 this respect. I'll let Mr. Robertson speak for  
15 himself, of course, but I think you have his position  
16 exactly right, but here's the point that I'm making.  
17 And in many cases this may not be a huge issue in  
18 certain circumstances.

19 It is not true that if the products are not  
20 colorably different, that is to say they are very  
21 similar, that you skip to a contempt finding. You  
22 then have to do an inquiry on infringement because,  
23 Your Honor, you could have products that are not  
24 colorably different but are a little different. Very,  
25 very little difference. Let's say that Your Honor

1 finds that they are not colorably different, but that  
2 little, little difference is sufficient to take them  
3 out from infringement.

4 THE COURT: I don't think *TiVo* held that.  
5 *TiVo* didn't address that issue. The argument may be  
6 that it flows from *TiVo*. I understand that. But I  
7 don't think -- it's been awhile. I read it and I may  
8 have it wrong. I think you described *TiVo* correctly  
9 when you first articulated what you thought it meant,  
10 not the most recent. And I don't mean when you first  
11 articulated it. I mean in the last time you tried to  
12 summarize it.

13 MR. KREVITT: I know. I know. Which is not  
14 a good sign. I certainly wasn't trying to change my  
15 position, Your Honor.

16 THE COURT: Let's stop now. Let's hold our  
17 powder.

18 MR. ROBERTSON: Your Honor, this is  
19 Mr. Robertson.

20 THE COURT: You want a shot at him anyway  
21 even though he's putting his musket back up?

22 Wait a minute, Mr. Krevitt. Have you served  
23 time in the Senate?

24 MR. KREVITT: The U.S. Senate, Your Honor?

25 THE COURT: Yes.

1 MR. ROBERTSON: Thank you, Your Honor.

2 THE COURT: Bye-bye.

3

4 (The proceedings were adjourned at 5:50 p.m.)

5

6 I, Diane J. Daffron, certify that the  
7 foregoing is a true and accurate transcription of my  
8 stenographic notes.

9

/s/

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DIANE J. DAFFRON, RPR, CCR

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